Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

AT&T CORP.,	)	
Complainant,	)	
v.	)	**FCC Docket No. 14-209** **File No. EB-09-MD-010**
ALL AMERICAN TELEPHONE COMPANY, INC., e-PINNACLE COMMUNICATIONS, INC., AND CHASECOM,	)	
Defendants.	)	

ALL AMERICAN TELEPHONE CO.,
e-PINNACLE COMMUNICATIONS, INC. AND CHASECOM
ANSWER AND AFFIRMATIVE DEFENSES RE
AT&T CORP.'S SUPPLEMENTAL COMPLAINT FOR DAMAGES

All American Telephone Co. ("All American"), e.Pinnacle Communications, Inc. ("e-Pinnacle") and ChaseCom (jointly, the "Collection Action Plaintiffs" or "CAPs"), hereby provide their Answer and Affirmative Defenses to the Supplemental Complaint for Damages filed by AT&T Corp. ("AT&T") in the above-captioned proceeding, dated October 24, 2014 ("Supplemental Complaint").

ANSWER

1. No response is required to paragraph 1 of the Supplemental Complaint.

2. The first sentence of paragraph 2 is admitted. The CAPs deny that AT&T may seek damages before this Commission, and that the Supplemental Complaint adequately addresses the additional issues referred by the federal District Court for the Southern District of New York, ("SDNY"). Footnotes 1 and 2 do not require a response.

3. In paragraph 3, AT&T makes numerous assertions regarding the Commission's findings in its "*Liability Order*."[1] That *Order* speaks for itself. The CAPs categorically deny AT&T's assertion that they "did not actually offer any services to AT&T . . . ." Such language does not appear anywhere in the *Liability Order*, and the Commission never made such a finding, either in the *Liability Order* or the *Reconsideration Order*. Instead, AT&T takes the Commission's finding that the CAPs did not provide service "pursuant to their tariffs"[2] and attempts to contort that finding into a legal conclusion that the CAPs did not provide any service whatsoever to AT&T. As demonstrated in this Answer and the accompanying Legal Analysis in Support of their Answer and Affirmative Defenses, Motion to Dismiss and Petition for Declaratory Ruling (the "Brief"), AT&T has already stipulated and pled to the fact that it received service from the CAPs, and is now stopped from arguing the contrary. AT&T's assertion that the *Liability Order* holds that the CAPs "merely served as vehicles for billing" is inaccurate – that term appears nowhere in the *Order*. Nevertheless, the CAPs admit that they billed AT&T for the Local Switching service that was provided by Beehive, and assert that, like any other billing/sales agent, they are due payment for the services they had caused to be delivered. The CAPs deny that the rates charged for the Local Switching services taken by AT&T "could not have been billed absent the sham arrangements" – the CAPs demonstrate in this Answer and in the accompanying Brief that, as a matter of fact and law, the Beehive tariffed rate for Local Switching, which is the rate that AT&T stipulates was billed by the CAPs, is the only rate that can apply to the service that AT&T has taken. The CAPs deny AT&T's assertion that the traffic at issue in this proceeding "flow[ed] to Utah. To the CAPs' information and belief, the Local Switching traffic provided by Beehive to AT&T flowed to both Utah and

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[1] *AT&T Corp. V. All American Tel. Co. et al.*, 28 FCC Rcd 3477 (2013) ("*Liability Order*"), recon denied, 29 FCC Rcd 6393 (2014) ("*Order on Reconsideration*").

[2] *Liability Order*, 28 FCC Rcd at 3492, ¶ 34.

Nevada. The CAPs admit that the *Liability Order* found that these services were billed at "high rates" but notes that the rates were never quantified, that no rate case against Beehive was ever conducted by the Commission, that the formal complaint proceeding that led to the *Liability Order* never conducted any rate analysis of any kind, and did not employ any Staff experts from the Competitive Pricing Division, and that the sole basis for the Commission's conclusion was the Commission's uncritical acceptance of AT&T's assertions, and those of its expert witness.[3] The CAPs admit the final sentence of paragraph 3.

4. The first sentence of paragraph 4 is admitted. The rest is denied. The "damages" asserted by AT&T and its witness Dr. Toof are impermissible as a matter of fact and law, are estopped by prior stipulations and testimony. Also, some of AT&T's asserted damages have been disallowed by the Market Disputes Resolution Division ("MDRD"). Specifically, the Letter Ruling issued on October 29, 2014 and signed by Lisa Griffin, MDRD Deputy Chief ("*October 29, 2014 Letter Ruling*"), states:

> Some aspects of the damages Complaint exceed the scope of the referred issues, and they otherwise do not involve technical or policy considerations within the FCC's "specialized experience, expertise, and insight. Consequently, the Commission will not address (1) any damages allegedly owed to AT&T relating to AT&T's payments to Beehive (Section I.B. and Count II of the Complaint); (2) calculation of interest on any damages allegedly owned to AT&T, and (3) attorneys' fees allegedly owed to AT&T.

October 29, 2014 Letter Ruling at 2.

5. The CAPs deny AT&T's assertion in paragraph 5 that they are "common carriers." As discussed in the Brief that accompanies this Answer, the findings of the Commission in the *Liability Order* lead to the conclusion, as a matter of law, that the Collection Action Plaintiffs are not – and were not at any time relevant to this proceeding – common carriers. As to AT&T's claims that it is entitled to have the CAPs pay it back for the access

[3] *Id.*, 28 FCC Rcd at 343480-81, ¶ 12 & n.37.

charges it paid to Beehive for the services it took from Beehive, plus pre-judgment interest, these claims have been disallowed by the *October 29, 2014 Letter Ruling*. That Ruling also disallows consideration of attorney's fees, cited in footnote 3.

6. The CAPs deny AT&T's assertion in paragraph 6 that its Supplemental Complaint adequately addresses the SDNY Court's referral issue 2. AT&T repeats its patently untrue assertion that the CAPs "had not provided any services to AT&T." As a matter of fact, this is belied by the record of the instant proceeding, including AT&T's stipulations and testimony. AT&T asserts that the only way the CAPs could obtain payment from AT&T is through a valid tariff or a contract negotiated with AT&T. This is only true for the recovery of rates regulated by the Commission, under a regulatory scheme that is enforceable at court. However, because the *Liability Order* voided the CAPs' tariffs *ab initio*, no regulatory regime of the Commission's ever applied to the services at issue in this proceeding. As a result, the CAPs must pursue their claim in *quantum meruit* before the SDNY Court. The CAPs deny AT&T's assertion that they "defrauded" AT&T – AT&T never asserted fraud in the instant proceeding, and the *Liability Order* makes no such finding. AT&T is estopped from raising the issue in this Liability Phase proceeding. The CAPs deny AT&T's assertion that "there is no basis for reducing AT&T's damages . . . ." The CAPs will pursue discovery – denied by MDRD during the Liability Phase of this proceeding – that demonstrates that AT&T would be unjustly enriched and the CAPs would be unreasonably deprived of fair compensation, if AT&T can force the CAPs to provide it a service over the course of years without any compensation. Footnote 4 does not require a response. In footnote 5, AT&T states that the *Liability Order*, "e.g. ¶ 17," contains a finding that the Collection Action Plaintiffs "had not provided any services to AT&T." This is a pure fabrication – the plain language of that paragraph makes

clear that the Commission never made such a finding. Moreover, AT&T's stipulations and testimony confirm that it received service from the CAPs.

7. Paragraph 7 repeats that the CAPs "did not provide any services to AT&T." As noted above, the CAPs deny this, and AT&T is estopped from so claiming. The CAPs deny AT&T's assertion that equitable relief is not available from the SDNY Court. AT&T claims that, outside of a tariff or negotiated contract, the CAPs cannot impose fees. But this is only the case under the regulatory framework regulated by the FCC. The *Liability Order* establishes that this regulatory regime does not apply to the CAPs, and so they are now free to pursue equitable relief in their SDNY collection action. State-based equitable remedies are not prohibited by the Commission's Title II regulatory authority – the Brief accompanying this Answer demonstrates that the Commission, the SDNY Court, and numerous other sources of authority have consistently found that equitable relief is available in cases where tariffs do not apply, and that AT&T's own past behavior belies its assertions here. The Supremacy Clause does not bar such relief – outside of its unsupported assertion to this effect in paragraph 7, AT&T's Supplemental Complaint does not make this argument, and provides no precedent to support it. Footnote 6 does not require a response.

8. In paragraph 8, no response to footnote 7 is required. The CAPs admit that the *Liability Order* found referral question 5a to be irrelevant. The CAPs deny that referral issues 5c and 5d are irrelevant – they go to the issue of AT&T's unjust enrichment, should its theory of "damages" be accepted. Issue 5e is not only relevant to the instant case, it is required in order to establish jurisdiction, and by Commission and court precedent. The CAPs list their proposed responses to all of the questions referred by the SDNY Court in the Proposed Order appended to their Petition for Declaratory Ruling, which is being filed with this Answer. This

issue is discussed in the Brief that accompanies this Answer. Finally, AT&T repeats its argument that "the CAPs didn't provide any service, and if they did, it's common carrier service." This argument is wrong as a matter of fact and law, and is the inescapable conclusion of the *Liability Order*. This issue is also discussed in the accompanying Brief.

9. The CAPs deny that AT&T is entitled to refunds of any amounts it paid them, because forcing the CAPs to provide service for years to AT&T would result in an unjust enrichment to AT&T, and an unjustified detriment to the CAPs. It would also violate the CAPs' 5th Amendment rights against unconstitutional, uncompensated regulatory takings. As to the other "damages" claimed in paragraph 9, the *October 29, 2014 Letter Ruling* disallows AT&T's claims for amounts AT&T paid to Beehive and pre-judgment interest. Finally, AT&T refers to "set-off" even though the Commission's rules do not allow defendant to pursue offset claims in response to supplemental damages complaints. (47 C.F.R. § 1.722(i)(4)) The Collection Action Plaintiffs will, however, proceed to prove the revenues realized by AT&T on the traffic provided by the CAPs, to pursue their unjust enrichment case against AT&T, and to demonstrate that no damages should be, or can be, awarded to AT&T.

10. Upon information and belief, the CAPs admit the statements made in paragraph 10 of the AT&T Supplemental Complaint. Footnotes 8 and 9 do not require a response.

11. All American admits the allegations of paragraph 11. Footnotes 10-12 do not require a response.

12. All American admits the allegations of paragraph 11. Footnote 13 does not require a response.

13. All American admits the allegations of paragraph 13. Footnotes 14-17 do not require a response.

14. All American admits the allegations of paragraph 14. Footnote 18 does not require a response.

15. e-Pinnacle admits the allegations of paragraph 15. Footnotes 19-22 do not require a response.

16. ChaseCom admits the allegations of paragraph 16. Footnote 18 does not require a response.

17. The Collection Action Plaintiffs admit that, prior to the ruling in the *Liability Order*, they held themselves out to be providing service as common carriers. This is why they maintained that their tariffs were valid, and sought enforcement in federal court under the Filed Rate Doctrine. However, when, on March 22, 2013 – years after the CAPs ceased providing service – the Commission ruled that their tariffs were invalid *ab initio* and that they were "sham entities" that did not act as competitive local exchange carriers, that ruling had the effect of finding that the CAPs are not now, and never were, common carriers. The CAPs briefed the reason for this inescapable legal conclusion in their Petition for Reconsideration and Clarification of the *Liability Order*,[4] and the Commission did not dispute or deny those arguments. This issue is further discussed in the Brief that accompanies this Answer. The Collection Action Plaintiffs deny AT&T's assertion in paragraph 17 that they "are liable under the complaint process in Section 206 to 208 for damages . . . ." In fact, now that the *Liability Order* is final and non-appealable, the Collection Action Plaintiffs are definitively not common carriers, and are not subject to Title II jurisdiction. This means that they cannot be subject to a formal complaint, that the Commission cannot find them liable for damages, and cannot prescribe rates for the services that AT&T admittedly took from them. In this regard, the CAPs are situated as billing/sales agents for the services provided to AT&T by Beehive, and have the

[4] Filed in the above-captioned docket, dated April 24, 2013.

right to be compensated for the role they played in causing the Beehive service to be provided to AT&T. This finding is fully consistent with the Commission's decision in its *Total Telecom* decision of 2001.[5]

18. No answer is required to paragraph. 18.

19. AT&T's assertions in paragraph 19 and footnotes 27 and 28 are admitted. All traffic invoiced by the Collection Action Plaintiffs in the instant proceeding were the Local Switching "tail circuits" of terminating interstate access service provided by Beehive. All traffic at issue terminated on Beehive facilities within Beehive exchanges in Utah and Nevada. The CAPs deny that Beehive should be characterized as a "non-party." In fact, because AT&T's "damages" claims involve issues of fact that are exclusively within the control of Beehive, Beehive must be made a party to the instant proceeding if the Commission proceeds to conduct a rate inquiry in this proceeding. The CAPs do not believe this step necessary, however, because the Commission can and should conclude this case without further proceedings by issuing a Declaratory Ruling, or an order based on the Supplemental Complaint, this Answer, and AT&T's Reply.

20. All American admits to AT&T's assertions made in paragraph 20, and footnotes 29-33. Specifically, All American admits AT&T's assertion that Joy was the sole customer for the service that All American invoiced to AT&T. As All American has demonstrated in its pleadings throughout the Liability Phase of this proceeding, both AT&T and the Commission have been fully aware that Beehive was providing "access stimulation" service by terminating calls to Joy Enterprises, Inc. since 2002.[6] Indeed, the Commission prescribed the access rates

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[5] *Total Telecommunications Services, Inc. v. AT&T Corp.*, 16 FCC Rcd. 5726, ¶ 16 (2001) ("*Total Telecom*").
[6] *AT&T Corp. v. Beehive Tel. Co., Inc.*, 17 FCC Rcd 11641 (2002).

that Beehive could charge for Joy access stimulation traffic in 2002,[7] and AT&T signed a settlement agreement that required AT&T to pay Beehive's tariffed access charges for all its traffic – which AT&T knew to include terminating access service to Joy chat and conference bridges – on August 20, 2007. That settlement agreement was in effect, and compelled AT&T to pay Beehive's tariffed access rates, at all times relevant to this proceeding.[8]

21. AT&T's description of the Collection Action Plaintiffs' complaint against AT&T before the SDNY Court is incorrect in that the complaint did not seek recovery of intrastate charges made under intrastate tariffs for the CAPs. The assertions in paragraph 20 are otherwise admitted. Footnotes 34 and 35 do not require responses.

22. CAPs admit that AT&T's characterization of its Answer and Counterclaims in the SDNY Court collection action that appear in paragraph 22 are accurate. Footnotes 36-39 do not require responses.

23. The assertions of paragraph 23 are admitted. Footnotes 40-44 do not require responses.

24. The assertions of paragraph 24 are admitted. Footnotes 45-47 do not require responses.

25. The CAPs deny AT&T's assertions in paragraph 25 that the AT&T complaint "addressed" referral issues 1a – 1e and issues from the SDNY Court's first referral order. The CAPs protested that as the defendant of the SDNY Collection Action, which opposed referral, AT&T should not be made the complainant in the formal complaint process designated to

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[7] Legal Analysis in Support of the CLECs' Answer to AT&T's Amended Formal Complaint, filed in the instant proceeding and dated June 14, 2010, at 12-13, 15, 41, 44-47 (AT&T and Beehive have been at war over access stimulation for 15 years, and have brought multiple actions before the Commission during that time, most resolved in favor of Beehive. The Commission prescribed switched access rates for Beehives access stimulation traffic in 1997 in *Beehive Tel. Co., Inc., Beehive Tel. Co, Inc. of Nevada, Tariff FCC No. 1*, PA 97-1674, Suspension Order, 12 FCC Rcd 11695 ¶ 3 (1997)).

[8] The settlement agreement is discussed in detail in a Confidential section of the CAP Brief that accompanies this Answer.

respond to the SDNY Court's referral. That objection was dismissed by MDRD. However, the CAPs demonstrated that AT&T abused its position as complainant in the referral proceeding by misrepresenting the referral questions and failing to present them adequately for Commission consideration. The MDRD responded to the CAPs' objections by allowing them to file a Surrebuttal that appropriately presented the referral questions to the Commission. The CAPs filed their Surrebuttal on August 4, 2010. The CAPs deny that AT&T's complaint addressed referral issue 1, which asks if the CAPs provided "switched access service." To date, this issue has not been addressed by the Commission. The CAPs otherwise admit to AT&T's interpretation of its Amended Complaint. In particular, the CAPs admit that AT&T argued that the amounts billed to AT&T for the terminating Local Switching access services that AT&T admits to taking from the CAPs was "inflated." The CAPs note that Count II of the Amended Complaint admits that the traffic should have been billed at "a fraction of a penny,"[9] thereby admitting that the cost and value of the service that AT&T took from the CAPs was not zero. The assertion in footnote 48 is admitted.

26. The CAPs deny AT&T's characterization of its Amended Complaint in paragraph. 26. AT&T's Count III asserts that, under AT&T's theory, the CAPs cannot obtain compensation for "regulated services" except through tariffs, negotiated contracts, or Commission rule.[10] The CAPs note that the predicate to this argument is AT&T's admission that the CAPs provided service to AT&T, and AT&T took service from them. The CAPs deny that the Amended Complaint "addressed" referral issues 5a, 5c, 5d, and 5e. As discussed in answer to paragraph 25, the CAPs demonstrated to MDRD that AT&T abused its position as complainant to ignore or misrepresent these referral issues, and so were granted a right to

[9] AT&T Amended Formal Complaint, dated May 7, 2010, at ¶ 135 ("Am. Complaint").
[10] Am. Complaint at ¶ 139.

submit a Surrebuttal to properly put the issues before the Commission. The CAPs deny that AT&T "demonstrated" that these referral issues do not affect the issues in this proceeding. None of those issues were addressed by the Commission in the *Liability Order*. Footnotes 49 and 50 do not require a response.

27. The assertions of paragraph 27 and footnotes 51 and 52 are admitted. The CAPs note that they objected to the bifurcation of issues in to "liability" and "damages" phases, on the grounds that it would cause unreasonable delay – which it unquestionably did – and because the referral issues presented questions of law that the Commission could address without delay. MDRD dismissed these objections.

28. The *Liability Order* speaks for itself. The CAPs deny that the paragraphs cited by AT&T stand for the propositions that AT&T asserts. The CAPs do not contest AT&T's description of the conclusions reached by the Commission in the *Liability Order*. The Collection Action Plaintiffs do note, however, that Beehive was never made a party to the case, despite the CAPs', and Beehives' objections. The Commission never analyzed the full terminating circuits, and never determined if the number and routing of Local Switching MOUs invoiced by the CAPs matched the number and routing of terminating Tandem Switching, Tandem Transport and Tandem Switch Termination elements invoiced by Beehive for the same calls. The Commission never examined whether the traffic at issue was properly invoiced under Beehive's Nevada or Utah rates. The Commission never considered whether Beehive's rates for the traffic at issue were reasonable, and the CAPs never had the opportunity to question either AT&T or Beehive witnesses regarding these issues, despite their consistent claims that they could not effectively defend against AT&T's claims without such evidence on the record. As the CAPs stated in their Petition for Reconsideration and Clarification of the *Liability Order*,

how could the Commission find that the CAPs were engaged in a "sham" arrangement to inflate rates above what Beehive could have charged, without analyzing Beehive's rates?[11] Especially when AT&T stipulated that it was "not contesting Beehive's rates" and admitted that the CAPs accurately reflected Beehive's tariffed rates in their invoices, and when the CAPs demonstrated that AT&T had, at all times relevant to this proceeding, a settlement agreement with Beehive that compelled it to pay Beehive's tariffed rates? The *Liability Order* never addressed these issues, and the Commission further ignored these issues when denying the CAPs' reconsideration request. The Commission cannot ignore these issues in the present "Damages" Phase proceeding.

29. The *Liability Order* speaks for itself, but the CAPs do not contest AT&T's characterization of that *Order* in paragraph 29 of its Amended Complaint. However, the *Liability Order* has invalidated the CAPs' tariffs *ab initio*, and declared the CAPs were "sham CLECs" that "had no intention at any point in time to operate as *bona fide* CLECs or provide local exchange service to the public at large"[12] As a result of these rulings, the CAPs' compliance *vel non* with their state-issued certificates of public convenience and necessity is irrelevant – they are not, and never were, common carriers and their tariffs never applied to the traffic at issue. For purposes of this "Damages" Phase hearing – and for purposes of finally answering the questions referred by the SDNY Court 5 ½ years ago – the only relevant questions are whether the rates tariffed by Beehive – the local exchange carrier that provided the service that AT&T admittedly took – were compliant with the Commission's rules.[13] As the CAPs demonstrated in previous pleadings in the Liablity Phase proceeding and their Petition for

[11] Petition for Reconsideration and Clarification of All American Telephone Co., e-Pinnacle Communications, Inc. and ChaseCom, filed in the above-captioned proceeding and dated April 24, 2013, at 9-12.
[12] *Liability Order*, 28 FCC Rcd at 3488 ¶ 25.
[13] See *Total Telecom* at 5742 ¶ 37; All American Telephone Co., e.Pinnacle Communications, Inc. and ChaseCom's Answer to AT&T Corp.'s Amended Formal Complaint, dated June 14, 2010, at 61-63 (CAP Answer).

Reconsideration and Clarification of the *Liability Order*, there can be no other conclusion than that Beehive's rates were lawful because:

- The tariffs are deemed lawful, and the statute of limitations prevents AT&T from challenging the rates now;
- The Commission and AT&T at all times knew that Beehive was providing the service underlying the CAPs' invoices, that such service was "access stimulation service" destined for Joy Enterprises and other conference and chat operators;
- That at all times relevant to the instant proceeding, Beehive's rates were either set by Commission prescription or were subject to a settlement agreement signed between AT&T and Beehive.

30. The *Liability Order* speaks for itself, but the CAPs do not contest AT&T's characterization of that *Order* in paragraph 30 of its Amended Complaint. However, the terms of the CAPs' tariffs, and whether there are "end users" within the meaning of those tariffs, are irrelevant – the *Liability Order* invalidates the tariffs *ab initio*. As discussed in the answer to paragraph 29 above, the only relevant facts for purposes of this "Damages" Phase are that the Beehive rates – which apply to the Local Switching charges invoiced by the CAPs, as well as to the Tandem Switching, Tandem Transport and Tandem Switch Termination charges invoiced by Beehive, for every minute of traffic at issue in this case, are incontestably reasonable, and applicable to the traffic at issue in this case.

31. The *Liability Order* speaks for itself, but the CAPs do not contest AT&T's characterization of that *Order* in paragraph 31 of its Amended Complaint. However, whether there are "end users" within the meaning of the CAP tariffs, and the CAPs' relations with their conference and chat operator customers, are irrelevant – the *Liability Order* invalidates the tariffs *ab initio*, and determines that the CAPs are not, and never were, local exchange carriers. As discussed in the answer to paragraph 29 and 30 above, the only relevant facts for purposes of this "Damages" Phase are that the Beehive rates – which apply to the Local Switching segment

of the traffic taken by AT&T, as well as to the Tandem Switching, Tandem Transport and Tandem Switch Termination segments of the service that AT&T took – are incontestably reasonable, and applicable to the traffic that the CAPs invoiced to AT&T.

32. The *Liability Order* speaks for itself, but the CAPs do not contest AT&T's characterization of that *Order* in paragraph 32 that the *Liability Order* found that: the CAPs engaged in a "sham" arrangement "to inflate" billed access charges to AT&T;" the CAPs "never intended to operate as bona fide CLEC or provide local exchange service to the public;" the CAPs did not own or lease facilities or unbundled network elements; that the CAPs served only a "handful of CSPs" [and in All American's case, only one – Joy Enterprises, Inc.]. All of these findings of the *Liability Order* demonstrate that the CAPs are not – and at no time relevant to this proceeding were – common carriers. CAPs also admit AT&T's proven assertion that, at all times relevant to this proceeding, the CAPs billed for their "traffic at tariffed rates that were benchmarked to Beehive's NECA rates . . ." and that the CAPs were "collaborating" with Beehive. The remainder of paragraph 32 – which deals with the CAPs' compliance with their state certificates, is admitted, but as described in the answer to paragraph 29, is irrelevant to this "Damages" Phase proceeding.

33. In paragraph 33 of the Amended Complaint, AT&T's assertions regarding the rate-related findings of the *Liability Order* are incomplete and misleading. The relevant findings of the *Liability Order* are as follows:

1. The CAPs operated "with the apparent . . . effect of inflating their billed access charges. 28 FCC Rcd 3487, header A.

2. The CAPs were created to "capture access revenues that could not otherwise be obtained by lawful tariffs. *Id.* at 3487 ¶ 24.

3. "Creation of Defendants allowed the access stimulation arrangements to continue at rates that would have been unsustainable had Beehive remained a Section 61.39

Carrier. *Id.* at 3488 ¶ 27.

4. The Commission "will ensure just and reasonable rates through the Section 208 Complaint process.: *Id.* at 3490 ¶ 29.

5. "But for the creation of Defendants, Beehive's scheme would have ended because, under the Commission's rules, Beehive itself no longer could charge high rates and retain the resultant revenue." *Id.* at 3491 ¶ 30.

6. "Defendants violated Section 201(b) of the Act by operating as sham entities for the purpose of inflating access charges that AT&T and other IXCs had to pay." *Id.* at 3492 ¶ 33.

In making these "findings," the Commission never identified what rates Beehive would have charged absent the "access stimulation scheme," and never even attempted to quantify the asserted "rate inflation." As the CAPs note in their answer to paragraph 3, above, no rate case against Beehive was ever conducted by the Commission, the formal complaint proceeding that led to the *Liability Order* never conducted any rate analysis of any kind, and did not employ any Staff experts from the Competitive Pricing Division. And the only authority cited by the *Liability Order* in support of its "rate inflation" and "unsustainable scheme" assertions is cites to AT&T's filings, and even here, no specific numbers are ever adopted.[14] Of course, as CAPs complained repeatedly, they are not capable of defending Beehive's rates, because they do not have access to Beehive's cost and revenue data, and do not have knowledge of Beehive's status within NECA.[15] That was true at the time of the Liability Phase proceeding, and remains true now. The gravamen of AT&T's Amended Complaint, and the finding of the *Liability Order*, is that by billing for Local Switching, the CAPs somehow enabled Beehive to charge higher access rates than it otherwise could. But neither AT&T nor the FCC ever addressed a fundamental flaw in this theory – for every minute of access traffic that the CAPs billed Local

[14] "Finding 1" is unsupported. "Finding" 2 cites AT&T's complaint, reply and briefs. 28 FCC Rcd at 3487 n. 103. "Finding" 3 cites AT&T's complaint and disputed facts. *Id.* at 3487 nn. 116 & 117. "Finding" 4 has no rate support. "Finding" 5 is unsupported. "Finding" 6 cites AT&T's amended reply. *Id.* at 3492 n. 144.
[15] Cites

Switching to AT&T, Beehive billed the same minute of Tandem Switching, Tandem Transport and Tandem Switch Termination. The traffic is the same. AT&T admits this in paragraph 33 ("Beehive also continued to charge the IXCs for tandem switching and access of stimulated traffic . . . ."), and elsewhere in the record of this proceeding. And the Liability Order states the same: "Beehive still made money. It charged the IXCs for tandem switching and transport of the stimulated traffic . . . ."[16] But if Beehive is reporting the full number of minutes of the "stimulated" traffic to NECA, how can the NECA rates applicable to this volume of traffic be excessive? Neither AT&T nor the *Liability Order* address this question, because MDRD refused to allow the CAPs to raise rate issues, and because Beehive was not made a party to the proceeding, and so could not justify its rates. So AT&T correctly quotes the *Liability Order* in the last sentence of paragraph 33, but that "finding" was never subject to any hearing and was never justified, and provides no basis for a "damages" claim in the instant proceeding.

34. The CAPs deny AT&T's assertion in paragraph 34 that AT&T ever negotiated potential settlement in good faith. The CAPs detail AT&T's patent bad faith in a Pre-Mediaton Statement filed on December 5, 2012, and again in a letter of complaint submitted to MDRD Staff following a settlement conference on December 27, 2012. The Pre-Mediation statement is part of the public record of this proceeding. The letter of complaint is a confidential document, and is attached as Confidential Exhibit A to the Brief that accompanies this Answer, and it speaks for itself.

35. The CAPs deny that the remaining referral questions – Issues 1, 2, 3, 5a, 5d and 5e – are set forth in Count III of its Amended Complaint. As with its Amended Complaint, AT&T is using its position as plaintiff to misrepresent the questions that have been referred by

[16] 28 FCC Rcd at 3489 ¶ 28.

the SDNY Court to this Commission. The questions that must be answered in the instant proceeding are:

1. Did All American, e-Pinnacle and Chasecom ("Plaintiffs") provide interstate switched access services . . . to AT&T with respect to the calls at issue?

2. If Plaintiffs failed to provide switched access services consistent with the terms of their tariffs, did Plaintiffs provide some other regulated service to AT&T for which they are entitled to compensation? If so, what is the rate that should be applied to that service?

3. If Plaintiffs did not provide a regulated service to AT&T, are Plaintiffs entitled to compensation to be established under a quantum meruit, quasi-contract or constructive contract theory, or some other theory?

5. What is the impact of the following questions on resolution of the foregoing issues?

a. What weight, if any, should be accorded to the FCC's finding that CLEC rates that match the prevailing ILEC rate are "conclusively deemed reasonable"? *See Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, at ¶ 60 (2001).

b. Did AT&T violate any provision of the Communications Act by refusing to pay the billed charges for the calls at issue and not filing a rate complaint with the FCC?

c. As a matter of telecommunications law and policy, is it appropriate for different LECs in the same service area, and absent a negotiated agreement, to charge different rates for terminating identical traffic to identical conference and chat operators?

d. As a matter of telecommunications law and policy, is it appropriate for the same CLEC in the same service area, and absent a negotiated agreement, to charge different rates to different IXCs for terminating identical traffic to identical conference and chat operators?

e. What is the classification of any service provided by Plaintiffs with respect to the calls at issue: switched access service, contract service, private carriage, or some other classification of service? Regulated service or unregulated service?

The CAPs deny that these questions are properly put before the Commission in Count III of the Amended Complaint. The CAPs admit the rest of paragraph 35. Footnotes 53-55 do not require a response.

36. The CAPs deny that they are liable to AT&T for any damages. The reasons are presented in the Affirmative Defenses that are part of this Answer, and in the Brief that accompanies it. In short: AT&T is precluded by § 207 of the Communications Act from pursuing damages before this Commission, the CAPs are not subject to the Commission's Title II jurisdiction, AT&T is estopped from pursuing its claims, its claims are precluded by Commission orders, the relief sought would violate the 5th Amendment of the Constitution, and the relief sought by AT&T would unjustly enrich AT&T and unfairly deprive the CAPs. As discussed in the answer to paragraph 4, above, the *October 29, 2014 Letter Ruling* disallows AT&T's claims for amounts AT&T paid to Beehive, pre-judgment interest and attorneys' fees. The assertions of the declaration of AT&T witness David Toof fail to support AT&T's damages claims for these reasons.

37. In paragraph 37, AT&T accurately quotes from the *YMax* decision,[17] but the CAPs deny that this decision is relevant to the instant proceeding because it deals with the regulatory obligations of common carriers providing regulated services. Because the *Liability Order* has determined that the CAPs are not, and never were, acting as competitive local exchange carriers, and did not, at any time provide service pursuant to a valid tariff, and so were not common carriers, regulatory obligations imposed upon common carriers by the Commission pursuant to its Title II authority are irrelevant to the CAPs. The *Liability Order* speaks for itself, nevertheless the CAPs admit the second sentence of paragraph 37.

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[17] *AT&T Corp. v. YMax Commc'ns,* 26 FCC Rcd 5742 (2011).

38. The CAPs deny that their collection action claims pending before the SDNY court must be dismissed, and they deny AT&T's apparent suggestion that the Commission has the authority to do so – it plainly does not. Now that the *Liability Order* has determined that the CAPs are not, and never were, common carriers, subject to Title II regulation, the CAPs are free to pursue their equitable claims against AT&T as unregulated billing/sales agents for the services that AT&T admittedly took from them. The *MCI v. Paetec* case[18] cited in footnote 56 is not relevant to the instant case. That unpublished decision deals with a regulated common carrier – Paetec – that was operating under a valid tariff, and calls made from wireless service providers that were transited over the Paetec network, and ultimately terminated to MCI. In the instant case, the CAPs are not, and never were common carriers, never had a valid tariff, and are not subject to Title II regulation. Moreover, wireless traffic is not involved in the instant case. The Commission has unique rules that apply to wireless carriers – they are not allowed to tariff or collect access charges on their traffic – that do not apply in the instant case. AT&T also cites *Bryan v. Bellsouth.*[19] The CAPs deny that this case is relevant in any respect to the case at bar. Like the *Paetec* case, it involves a type of charge that has nothing to do with the service at issue in the instant proceeding – in this case, a claim for full or partial refund of federal Universal Service Fund fees imposed on carriers by the Commission, and passed through to consumers in carrier bills. In any event, the court in that case dismissed the plaintiff's claim for a refund of fees paid, and so to the extent it is relevant at all – and it is not – the case supports the CAP position. The CAPs deny that 47 U.S.C. §§ 203 or 415 are relevant to the instant proceeding – they deal with the regulation of common carriers, and so are not applicable to the CAPs. The CAPs admit the amounts from the *Toof Report* that AT&T paid to the CAPs. The CAPs deny

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[18] *MCI Worldcom Network Services, Inc. v. Paetec Commc'ns Inc.*, 2005 WL 2145499 (E.D. Va. 2005).
[19] *Bryan v. Bellsouth Commc'ns, Inc.* 377 F.3d 424 (4th Cir. 2004).

AT&T's claim, or Dr. Toof's calculation, of pre-judgment interest because the *October 29, 2014 Letter Ruling* disallows this claim.

39. In paragraph 39, AT&T attempts to distinguish three Commission decisions that unequivocally hold that a provider of a service merits compensation, whether or not the service was properly tariffed. AT&T states that its direct damages claim should not be "reduced at all based on the *New Valley* cases."[20] It is obvious why AT&T asks the Commission not to consider these cases: they all raise identical issues to the case at bar, and reject claims for a refund of paid charges for untariffed services that are identical to AT&T's claim in the instant case. The *New Valley* cases involve a complaint against Pacific Bell, which charged its customer, and received payment for, a service that was not listed in its tariff. In dismissing the customer's claim for a refund of all monies paid to Pacific Bell, the Commission stated: "We find no basis in Maislin[21] or any other court or Commission decision for the conclusion that a customer may be exempt from paying for services provided by a carrier if those services were not properly encompassed by the carrier's tariff." That Bureau decision was later affirmed by the full Commission. Similarly, the *Farmers & Merchants III* decision is directly on point – it was the first of the "access stimulation" cases decided under the Genachowski Administration that retroactively invalidated the tariffs at issue. In that decision, the Commission expressly considered whether Farmers & Merchants could still recover compensation, despite having its tariff invalidated for access stimulation traffic, and concluded that it could:

> This is not to say that Farmers is precluded from receiving any compensation at all for the services it has provided to Qwest. *See, e.g., New Valley Corp. v. Pacific Bell*, Memorandum Opinion and Order, 15 FCC Rcd 5128, 5133, ¶ 12

[20] Am. Complaint at ¶ 39, citing *New Valley Corp. v. Pacific Bell*, 15 FCC Rcd 5128 (2000) ("*New Valley Recon*"), *aff'g, New Valley Corp. v. Pacific Bell*, 8 FCC Rcd 8126 (1993) ("*New Valley Order*"); also citing *Qwest Commc'ns Corp. v. Farmers & Merchants Mutual Tel. Co.*, 24 FCC Rcd 14801 (2009) ("*Farmers & Merchants II*").

[21] *Maislin Industries, Inc. v. Primary Steel, Inc.*, 497 U.S. 161 (1990),

(2000) (fact that a carrier's tariff did not include rates or terms governing the service provided did not mean that the customer was entitled to damages equal to the full amount billed; rather "where, as here, the carrier had no other reasonable opportunity to obtain compensation for services rendered . . . a proper measure of the damages suffered by a customer as a consequence of a carrier's unjust and unreasonable rate is the difference between the unlawful rate the customer paid and a just and reasonable rate"), *aff'g New Valley Corp. v. Pacific Bell*, Memorandum Opinion and Order, 8 FCC Rcd 8126, 8127, ¶ 8 (Com. Car. Bur. 1993) (finding no basis in the Supreme Court's "*Maislin* [decision] or any other court or Commission decision for the conclusion that a customer may be exempt from paying for services provided by a carrier if those services were not properly encompassed by the carrier's tariff"). *See also America's Choice, Inc. v. LCI Internat'l Telecom Corp.*, Memorandum Opinion and Order, 11 FCC Rcd. 22494, 22504, ¶ 24 (Com. Car. Bur. 1996) (holding that "a purchaser of telecommunications services is not absolved from paying for services rendered solely because the services furnished were not properly tariffed").[22]

That case was settled by the parties and so never proceeded to a "damages phase." Indeed, this instant case is the first "access stimulation" case to proceed to a "damages phase," and in deciding it, the Commission must follow its precedent. Indeed, many other cases besides those cited above confirm that the CAPs are entitled to compensation for the service that caused to be delivered to AT&T, and that AT&T admittedly took. These are discussed in more detail in the Brief that accompanies this Answer. Finally, the CAPs deny AT&T's sole rationale for seeking a refund of the small amounts it paid – its assertion that "the Defendants did not provide any service to AT&T." As the CAPs discuss in their answer to paragraph 3, above, this is a ridiculous fiction – AT&T takes the *Liability Order's* finding that the CAPs did not provide service pursuant to their tariffs, and attempts to contort it into the factual assertion that it never received any service at all. As discussed above, and in the Brief that accompanies this Answer, AT&T is estopped from making this argument by its own stipulations, admissions in its pleadings and witnesses' statements, and by the factual record established in the instant proceeding.

[22] *Farmers & Merchants III*, 24 FCC Rcd at 14812 n.96 (emphasis added).

40. The CAPs deny AT&T's claims for prejudgment interest on the grounds that the *October 29 Letter Ruling* disallows this claim. For this reason, the CAPs deny AT&T's argument in footnote 58 and deny that the cases cited support its claim for interest damages. Footnote 57 does not require a response.

41. The CAPs deny AT&T's calculation of potential damages in paragraph 41. First, AT&T is unable to recover any damages, for reasons discussed in the following Affirmative Defenses, and in the Brief that accompanies this Answer. In addition, the *October 29, 2014 Letter Ruling* disallows AT&T's claim for prejudgment interest.

42. The CAPs deny that they are, or ever were, common carriers, per the Commission's ruling in the *Liability Order*. For the same reason, AT&T's reference to 47 U.S.C. § 206 and the *Farmers Appeal Order* is inapposite. As to the reason for AT&T's argument in paragraph 42, and Subheading B, the CAPs deny that AT&T is entitled to consequential damages for the access charges paid by AT&T to Beehive for the access stimulation traffic, as that claim has been disallowed by the *October 29, 2014 Letter Ruling.*

43. The CAPs deny that AT&T is entitled to consequential damages for the access charges paid by AT&T to Beehive for the access stimulation traffic, as that claim has been disallowed by the *October 29, 2014 Letter Ruling.* For this reason, the CAPs deny that the cases cited and quoted in footnotes 59 and 60 can support AT&T's claim for consequential damages.

44. The CAPs deny that the case quoted and discussed in paragraph 44 and footnotes 61 and 62 can support AT&T's claim for consequential damages for the access charges paid by AT&T to Beehive for the access stimulation traffic, as that claim has been disallowed by the *October 29, 2014 Letter Ruling.* The CAPs deny that they can be subject to any damages award

recoverable under § 206 of the Communications Act, because they are not, and never were, common carriers, and are not subject to Title II regulation.

45. The CAPs deny that there are other consequential damages that AT&T could assert, but did not. First, for reasons discussed in the Affirmative Defenses below and the Brief that accompanies this Answer, AT&T may not seek any damages against the CAPs. Second, the consequential damages posited by AT&T in paragraph 45 and footnote 63 would be disallowed by the *October 29, 2014 Letter* Ruling as claims that "exceed the scope of the referred issues, and they otherwise do not involve technical or policy considerations within the FCC's "specialized experience, expertise, and insight." The CAPs deny that they can be subject to any damages award recoverable under § 206 of the Communications Act, because they are not, and never were, common carriers, and are not subject to Title II regulation.

46. The CAPs deny that the arguments made by AT&T in paragraph 46 and footnote 64 can support AT&T's claim for consequential damages for the access charges paid by AT&T to Beehive for the access stimulation traffic, as that claim has been disallowed by the *October 29, 2014 Letter Ruling.* The CAPs deny that they can be subject to any damages award recoverable under § 206 of the Communications Act, because they are not, and never were, common carriers, and are not subject to Title II regulation.

47. The CAPs deny that the arguments made by AT&T in paragraph 47 and footnote 65 can support AT&T's claim for consequential damages for the access charges paid by AT&T to Beehive for the access stimulation traffic, as that claim has been disallowed by the *October 29, 2014 Letter Ruling.* Moreover, as discussed in the Affirmative Defenses below and the Brief that accompanies this Answer, AT&T is estopped from contesting Beehive's rates by its

stipulations, admissions in its pleadings and expert testimony, its settlement agreement with Beehive and Commission findings.

48. The CAPs deny AT&T's assertion in paragraph 47, and purportedly supported by precedent cited in footnote 66, that it is "entirely reasonable, and consistent with Section 206, to require Defendants to compensate AT&T for the charges that it paid Beehive . . ." as that claim has been disallowed by the *October 29, 2014 Letter Ruling.* The CAPs deny that they can be subject to any damages award recoverable under § 206 of the Communications Act, because they are not, and never were, common carriers, and are not subject to Title II regulation. AT&T's assertion that "as the Commission found . . . AT&T could have elected to sue Beehive directly . . ." is a pure fabrication – the Commission never made such a finding. Moreover, as discussed in the Affirmative Defenses below and the Brief that accompanies this Answer, AT&T is estopped from contesting Beehive's rates by its stipulations, admissions in its pleadings and expert testimony, its settlement agreement with Beehive and Commission findings.

49. The CAPs admit the statements in paragraph 49. Regarding the statement in footnote 67, the CAPs admit that every minute of traffic that they billed to AT&T represented the Local Switching "tail circuit" of Beehive's terminating switched access service, for which Beehive billed Tandem Switching, Tandem Transport and Tandem Switch Termination. The CAPs lack the knowledge of Dr. Toof's methodology, and so can neither admit nor deny the rest of footnote 67.

50. The CAPs deny AT&T's assertion in paragraph 40, and purportedly supported by precedent cited in footnotes 68 and 69, that it is "appropriate to award AT&T pre-judgment interest . . ." as that claim has been disallowed by the *October 29, 2014 Letter Ruling.*

51. The CAPs deny that AT&T may seek interest damages, regardless of the computational methodology described in paragraph 51, as that claim has been disallowed by the *October 29, 2014 Letter Ruling.*

52. The CAPs deny that AT&T may seek the consequential and interest damages that are reflected in the $18.6 million claim stated in paragraph 52, as those claims have been disallowed by the *October 29, 2014 Letter Ruling.*

53. Paragraph 53 and Subheading C discuss AT&T's purported claim for attorneys' fees. Such claim is irrelevant to the instant proceeding, as it has been disallowed by the *October 29, 2014 Letter Ruling.* The CAPs deny that they can be subject to any damages award recoverable under § 206 of the Communications Act, because they are not, and never were, common carriers, and are not subject to Title II regulation.

54. Paragraph 54 is a statement of AT&T's intent, and does not require a response.

55. The CAPs admit that AT&T accurately quotes Referred Issue 2 in the first two sentences of paragraph 55. The CAPs deny AT&T's argument that "they provided *no* services to AT&T . . . ." (emphasis in original). This statement simply ignores reality – calls made by AT&T's long distance customers to chat and conference services were delivered to those services, and no calls were blocked – and this was never a finding of the *Liability Order*, which found only that the CAPs did not provide service pursuant to their tariffs.[23] Moreover, as CAPs demonstrate in the following paragraphs, AT&T and its expert witness have previously admitted in this proceeding that service was provided, and that AT&T's calls were terminated, and so AT&T is estopped from asserting the opposite now.[24] The CAPs deny AT&T's statement that they are "not entitled to any compensation from AT&T," and this is of course

[23] 28 FCC Rcd at 3492 ¶ 34 and *passim*.
[24] General estoppel CITE